92-1681

NO.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. ET AL,

Petitioners,

V.

THE GROCERS SUPPLY COMPANY,

Respondent/Cross-Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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THE GROCERY SUPPLY COMPANY

QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Act preempts ADEA claims of economic strikers who seek to enforce reinstatement rights created by the NLRA.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Grocers Supply Company was the Defendant-Appellee in the court of appeals.

The Plaintiffs-Appellants in Case No. 91-2493 were Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr. and 126 additional individuals who opted in pursuant to 29 U.S.C. §216(b). Their names are listed below.[1]

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[1] Aaron Ben, Willis Ben, Glendon Felix Bertrant, Carl Boyd, Lenzie Burke Sr., Sylvester Burley, Leslie Campbell, Major Campbell, Willie Chatman, Sam Clark, L. C. Clayton, Samuel Clinton, Richard Coleman, Alvin Coney, Elijah Coruthers, Bruce Craft, Glen H. Craft, James E. Darby, Bill Davis, Jessie C. Davis, Charles Dease, Willie Deason, Jesse Doggett, Joe Douglas, William Drewy, Walter Ealey, Donald Edwards, Edward Espree, Melvyn Finkelstein, Nelson Frank, James A. Garner, Arturo N. Garza, Marshall George, Herbert Gladney, Elbert L. Gooden, Ernest Grant, Allen Green, Costell Green, Dalfred Greene, Judge Greene, Lonnie Greene, Tom Greene, Wilfred Greene, James Greer, Vernon Gross, Larry J. Guillory, Edward Gums Jr., Elbert E. Hailey, Turner Hall, Alfred Hamilton, Alfred Hamilton, Robert Hargrove, Leonard Harris, Willie Harris Jr., Joseph Henry, Edward Hernandez, James Hightower, James Hill, Carl Edward Hinton, Gilbert Hogan, Clarence Holloway Sr., Raymond Hooks, Eugene Hunter, W. L. Hunter, Sr., Clarence Ivory, Earnest L. Jackson, Emmerson Jackson, James Jackson, Leland Jackson, Levearl Jackson, Lorenzo Jackson, Richard Jackson, Talton Jacobs, Wheeler Johnson, Craig Jones, Floyd Jones, Marvin Jones, Roy Jones, Cardis L. King, Hillary Ladet, Curtis Landry, A. G. Lane Jr., Robert Latin, George Lee, Jerry Mack, Felix Martin, Aubrey McAfee Jr., Dan Meekins Sr., Clay Menifee, Jerome D. Minor, Robert Mosley, Harold E. Neal, Alvin Patterson, George Patterson, Freelon Payton, Bobby Pittman, Willie Readus, Curtis Richardson, Edward Rideout, Jerry Roach, R. L. Robins, Rollie Rogers, Milton Royer, Harvey Rusher, Harvey Rusher, Robert Sanders, James Scott, Murray Scott, Wilson Scott, Archie Searcy, Gary Don Seastrunk, James Simmons, Leroy Smith, Manfred Spencer, James Thomas, Lloyd Tolivar, Kirby Veazie, Howard Washington, Robert Webster, K. T. Wheatfall, Alfred Whittington, Earnest Williams, Eldrid Williams,

Additionally, in the court below this case was consolidated with Case No. 91-6043, styled *James E. Hamilton, et al v. The Grocers Supply Company.*

Thomas Williams, William Barlow Wright, Clarence Young, and Russell Young.

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No.

In the

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October Term, 1992

Richard L. Britt and Timothy Jackson, Jr. Et Al,

Petitioners,

v.

The Grocers Supply Company,

Respondent/Cross-Petitioner

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

The Grocers Supply Company respectfully prays that, in the event writ of certiorari in this case is granted, this Court also grant this cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit on the issue of NLRA preemption of an ADEA claim.

OPINIONS BELOW

The decision of the district court in the *Britt* case is reported at 760 F. Supp. 606 (S.D. Tex. 1991). The decision of the court of appeals is reported at 978 F.2d 1441 (5th Cir. 1992). The decision of the court of appeals on petition for rehearing by the *Hamilton* plaintiffs is reported at 986 F.2d 97 (5th Cir. 1993).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on December 15, 1992. Rehearing was denied on March 1, 1993. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1). Cross-petitioners received the *Britt* plaintiffs' petition for writ of certiorari on March 17, 1993. Therefore, this cross-petition is timely under Supreme Court Rule 12.3.

STATUTES INVOLVED

This case involves the relationship between the National Labor Relations Act, as amended 29 U.S.C. § 151 *et. seq.*, and the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et. seq.* Pertinent provisions of those statutes are reprinted in the appendix.

STATEMENT OF THE CASE

In December 1986, several hundred employees of the Grocers Supply Company in Houston, Texas, went on strike after contract negotiations broke down. These employees were members of a bargaining unit of drivers and warehouse workers who were represented by the Teamsters Union. Grocers immediately hired temporary replacement workers to continue its operations. After one month of the strike, Grocers began offering the replacement workers permanent positions. Negotiations failed, and in April 1987, the strikers made an unconditional offer to return to work. The union and the company then agreed that the strikers would be returned to work in accordance with federal labor law as provided by *The Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970); (employer is required to offer positions to returning strikers as vacancies occur, except for those strikers who retired, resigned, or were terminated for misconduct). A

recall agreement was reached specifying in detail the order in which strikers would be recalled as vacancies occurred. Disputes over the recall procedure were to be resolved by final and binding arbitration.

Grocers had few openings to be filled after the strike, primarily due to low turnover and increased productivity. Initially, the strikers pursued traditional labor law remedies in order to get their jobs back. In September 1987 the Teamsters local union filed an unfair labor practice charge with the NLRB, alleging that Grocers had unlawfully discriminated against the strikers by refusing to rehire them. The NLRB Regional Director investigated the charge, found it without merit, and refused to issue a complaint. Subsequent unfair labor practice charges with similar allegations were likewise investigated and dismissed by the NLRB.

A group of strikers (the "Hamilton plaintiffs") then filed a § 301 suit in federal district court, alleging that Grocers had breached the recall agreement, in violation of 29 U.S.C. § 301. In February 1988, the Hamilton plaintiffs amended their complaint to allege age discrimination. A second group of strikers (the "Britt plaintiffs") filed their age discrimination cause of action in November 1988.

The district court granted summary judgment on the Britt plaintiffs' ADEA claim based on two grounds: (1) the NLRA preempted the ADEA claim; and (2) failure to present a triable issue of fact on the discrimination claim.

As for the *Hamilton* case, the district court granted a directed verdict for Grocers at the close of the plaintiffs' evidence on the ADEA claim. The district court had earlier granted summary judgment on the *Hamilton* plaintiffs' § 301 contract claim and the state law claims.

On appeal, the Fifth Circuit affirmed both judgments in favor of Grocers. However, the court expressly disagreed

with the district court's holding in the *Britt* case that the NLRA preempts the ADEA claims. Admitting that the issue was one of first impression, the court found that traditional preemption analysis was "not quite satisfactory," at least where the conflict is between two federal statutes. Relying heavily on cases holding the no age claim could be asserted under 42 U.S.C. §1983, the Court held that the ADEA provided the *exclusive* means for asserting age discrimination claims. Thus, far from having exclusive primary jurisdiction over this case, the NLRB did not even have *concurrent* jurisdiction to hear this dispute involving the strikers' reinstatement rights, according to the Fifth Circuit.

REASONS FOR GRANTING THE CROSS-PETITION FOR WRIT OF CERTIORARI

For the reasons outlined below, Grocers Supply Company believes that a writ of certiorari to review the issue of NLRA preemption of certain ADEA claims is appropriate. However, in accordance with Supreme Court Rule 13.5, this cross-petition need not be granted unless the Court decides to grant the petition filed by either the *Britt* or *Hamilton* plaintiffs.

A. The Issue of NLRA Preemption of ADEA Claims is an Important Question of Federal Law Which Should Be Settled By This Court.

The Fifth Circuit's decision below addressed an issue of first impression: whether the National Labor Relations Act preempts an ADEA claim arising out of an employer's refusal to reinstate certain bargaining unit employees following an economic strike. Resolution of this issue requires a harmonization of two overlapping and apparently conflicting statutory enforcement schemes: the NLRA, with its specialized administrative tribunal charged with formulating and administering federal labor policy, and the ADEA,

which relies upon the federal court system for ultimate resolution of administrative charges processed through the EEOC.

The employment practices challenged by the strikers are nothing other than alleged violations of rights and duties created by the NLRA—*i.e.* the duty to bargain in good faith (29 U.S.C. § 158(a)(5)), and recall rights of economic strikers who have been permanently replaced. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Thus, the strikers' ADEA claims are necessarily predicated upon NLRA rights and duties.

The Supreme Court has articulated two distinct NLRA preemption principles, both of which are applicable here. The first, so-called *Garmon* preemption, is founded upon the exclusive primary jurisdiction of the NLRB to determine unfair labor practices. *San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. 236 (1959). The test for *Garmon* preemption is very simple:

> When an activity is arguably subject to § 7 or § 8 of the [NLRA], the states as well as federal courts must defer to the exclusive competence of the National Labor Relations Board.

359 U.S. at 245. The rationale for assigning exclusive primary jurisdiction to the NLRB is to assure uniform interpretation and integrated enforcement of national labor policy. *Garner v. Teamsters*, 346 U.S. 485, 490-91 (1953) ("A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law").

Although the *Garmon* case involved preemption of state court claims, NLRA preemption unquestionably applies to federal courts as well. *See, e.g., Communications Workers of America v. Beck*, 487 U.S. 735-742 (1988); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete*

Co., 484 U.S. 539, 552 (1988). As the Supreme Court has observed:

> The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so.

Garner v. Teamsters, 346 U.S. at 491.

A party will not be permitted to circumvent the NLRA's preemptive effect by artful pleading. *Communications Workers of America v. Beck*, 487 U.S. at 743 ("Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of [another federal statute]"). In preemption cases, "it is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) (rejecting argument that preemption did not apply because complaint alleged breach of contract rather than unfair labor practice).

Here, the "conduct being regulated" clearly falls within the prohibition of the NLRA. If Grocers discharged or wrongfully failed to reinstate the strikers, then it violated Sections 8(a)(1) and 8(a)(3) of the NLRA, without regard to its intent or motivation. *The Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Similarly, if the Company failed to bargain in good faith, it violated Sections 8(a)(1) and 8(a)(5) of the Act. § 158(a)(5). Thus, the test for *Garmon* preemption is clearly satisfied; the only question is whether there are grounds for exception to the rule in this case.

Departures from this general rule of exclusive NLRB jurisdiction have been carefully circumscribed:

> There are situations in which district judges must occasionally resolve labor issues, **but they surely represent the exception rather than the rule.**

Advanced Lightweight, 484 U.S. at 552 (emphasis supplied). Contrary to the Fifth Circuit's decision below, none of the recognized exceptions to NLRA preemption involve cases in which the core of the dispute involves unfair labor practices or employment rights having their source in the NLRA. *See, e.g., Connell Constr. Co. v. Plumbers*, 421 U.S. 616 (1975); (court may decide collateral labor law issues raised in defense to antitrust claim); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (Congress deliberately chose to permit court enforcement of § 301 suits to enforce rights created by collective bargaining agreement); *Vaca v. Sipes*, 386 U.S. 171, 183 (1967) (no preemption of fair representation suits, because this cause of action had been judicially recognized prior to NLRB assumption of jurisdiction of such cases in 1947); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (no preemption of malicious libel action arising in context of labor dispute, because "this court cannot . . . conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law"). None of these exceptions are applicable here.

The second preemption principle recognized by the Supreme Court is the so-called *Machinists* preemption. *See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). This doctrine precludes federal or state regulation of conduct which "Congress intended [to] be unregulated." *Id.* at 140. While the labor-management relationship is structured by the NLRA, certain activity intentionally has been left "to be controlled by the free play of

economic forces." *Id., quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

Reviewing the history of this line of preemption cases, Justice Brennan observed:

> [T]he Court soon recognized that a particular activity might be "protected" by federal law not only where it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the "economic weapons in reserve . . . actual exercise [of which] on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

427 U.S. at 141, *quoting NLRB v. Insurance Agents* 361 U.S. 477, 488, 489 (1960) (emphasis in original).

Like *Garmon* preemption, preemption under the *Machinists* doctrine precludes federal as well as state intrusion into areas deliberately left unregulated by the NLRA:

> And indubitably regulation, **whether federal or state,** of "the choice of economic weapons that may be used as part of collective bargaining [exerts] considerable influence upon the substantive terms on which the parties contract." *NLRB v. Insurance Agents, International Union, supra*, at 490. The availability or not of economic weapons that federal law leaves the parties free to use cannot "depend upon the forum in which the [opponent] presses its claim." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 256 (1974).

Machinists, 427 U.S. at 153 (emphasis supplied).

The NLRA reflects a deliberate, careful balancing of power between labor and management. Economic self help was viewed as an integral part of the collective bargaining process. *See NLRB v. Insurance Agents*, 361 U.S. at 495

("the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining"). Although the most common economic weapon is an employee strike, employers likewise possess federally sanctioned economic weapons:

> "[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, and the state may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees.

Machinists, 427 U.S. at 147 (citations and footnotes omitted). One of the employer economic weapons expressly recognized by *Machinists* is the hiring of permanent replacements for striking employees. *Id.* at 153.

Of course, that is just what Grocers did in this case; it lawfully exercised its right to permanently replace these economic strikers. Having lost the strike, the plaintiffs were attempting to gain from an ADEA jury what it could not obtain at the bargaining table. But nothing in the ADEA or its legislative history suggests that Congress intended to alter the NLRA's delicate balance of powers between labor and management, or to burden the employer's right to resort to its own economic weapons in response to the economic weapons used by its employees. Yet the novel age discrimination theory advanced here would have precisely this effect.

In *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), the Supreme Court held that the NLRA precluded a city from conditioning the renewal of a taxicab franchise upon the company's settlement of a labor dispute with its striking drivers. According to the Court:

> "Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.". . . The settlement condition imposed by the [City] . . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons.

Golden State, 473 U.S. at 19, *quoting New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519 at 551 (1979) (Powell, J., dissenting).

The strikers' discrimination theory would intrude into the collective bargaining process and frustrate congressional intent no less than the city council action condemned in *Golden State*. Such an intrusion is not countenanced by either the ADEA or the NLRA.

Review by this Court would therefore be appropriate in order to resolve this conflict between two overlapping federal regulatory schemes.

B. The Fifth Circuit Has Decided The NLRA Preemption Issue In A Way That Conflicts with Applicable Decisions Of This Court.

The Fifth Circuit's decision conflicts with several decisions of this Court. In the first place, the court of appeals ruled that the ADEA is the *exclusive* remedy for age discrimination claims, and that the NLRB did not even have concurrent jurisdiction over the strikers' reinstatement claims. The court adopted the reasoning of several district court decisions which had concluded that Congress intended "to subject all age discrimination claims to the comprehensive statutory scheme clearly embodied in the language and legislative history of the ADEA." 978 F.2d at 1448.

This conclusion is directly contrary to the recent holding of this Court in *Gilmer v. Interstate/Johnson Lane Corp.*,

111 S.Ct. 1647 (1991). This Court there held that it was permissible to resolve age discrimination claims by compulsory arbitration. Given "the ADEA's flexible approach to resolution of claims," the Court found nothing in the language or legislature history of the ADEA to preclude resolution of age claims outside of the statutory procedure. 111 S.Ct. at 1654.

In addition to *Gilmer*, the Fifth Circuit's opinion is also at odds with longstanding Supreme Court precedent holding that statutory remedies must be tied to the statutory rights they were created to enforce. Grocers does not contest the proposition that, in a proper case, an employee may pursue parallel remedies under the NLRA and the ADEA to vindicate the **separate** rights created by those statutes. In this case, however, the strikers' ADEA claims are grounded foursquare on rights found **only** in the NLRA — *i.e.* the recall rights of returning economic strikers under *MacKay Radio*, and the duty to bargain in good faith under Section 8(a)(5).

Alleged violations of rights guaranteed by one federal statute do not give rise to remedies provided by other federal statutes. This was the import of the Supreme Court's holding in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), which dealt with the interplay between the NLRA and Title VII. Several black union members were discharged after they had sought to bargain separately with their employer over the issue of racial discrimination. The employees argued that, because their discharges violated the anti-retaliation provision of Title VII, the discharges also violated Section 8(a)(1) of the NLRA, thereby entitling them to the speedier and more effective relief provided by the NLRB. The Court rejected this contention, on the grounds that Congress had provided a means other than the NLRB to enforce Title VII rights:

> [W]e do not call into question either the capacity or the propriety of the Board's sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function — adjudication of claimed violations of Title VII—that Congress has assigned elsewhere.

420 U.S. at 72 n. 25. After detailing the many significant differences between proceedings initiated under Title VII and an unfair labor practice proceeding, the Court concluded:

> In order to hold that employer conduct violates § 8(a)(1) of the NLRA **because** it violates § 704(a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature. This, obviously, we cannot do.

420 U.S. at 73 (emphasis in original).

In other words, federal remedies are not fungible. The statutory source for the asserted right determines the statutory remedy available. The Supreme Court reaffirmed this principle in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). The case involved a choice between ERISA or NLRA remedies for delinquent contributions to an employee benefit plan following the expiration of a collective bargaining agreement. The court held that the NLRA remedy controlled, because the source of the duty to make such contributions was the NLRA, not ERISA. As part of its analysis, the Court hypothesized the effect on the parties' rights if the NLRA did not exist at all:

> If the labor legislation were simply repealed, *in toto*, petitioners would have no basis for claiming that an employer had any duty to continue making contributions to a fund after the expiration of its contractual commitment to do so. The duty that

> does exist is simply a consequence of a broader labor law duty that was created to protect the collective-bargaining process. Unilateral changes in the terms and conditions of employment are prohibited, not to vindicate the interests that motivated the enactment of [ERISA], but to carry out the purposes of the NLRA. The net effect of the labor law duties imposed on employers by that legislation provides a substantial benefit to ERISA plan trustees, but Congress has not provided them with a unique and preferred procedure for obtaining redress for an employer's violation of its duty to bargain with the union.

484 U.S. at 553.

A similar analysis in this case yields the same result. If the NLRA were taken out of the picture, then the strikers would have no claim whatsoever to their old jobs, because nothing in the ADEA entitles economic strikers to preferential recall rights. Nor is there anything in the ADEA requiring good faith bargaining. Absent the NLRA, the plaintiffs cannot show that they have suffered any legally cognizable harm. Therefore, the strikers may not seek to enforce these rights through means other than those which Congress deliberately provided for that purpose.

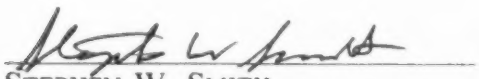
Because the Fifth Circuit's decision conflicts with this Court's decisions in *Gilmer, Emporium Capwell,* and *Advanced Lightweight,* a writ of certiorari on this issue would be appropriate.

CONCLUSION

For these reasons, Grocers respectfully submits that this CrossPetition for Writ of Certiorari be granted, in the event this Court grants the petition of either the *Britt* or the *Hamilton* plaintiffs.

Respectfully submitted,

Fulbright & Jaworski L.L.P.

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APPENDIX

1. National Labor Relations Act

29 U.S.C. § 157:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Age Discrimination in Employment Act

29 U.S.C. § 623(a):

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.